

***United States Court of Appeals
for the Second Circuit***



APPENDIX

Original

75-7329

United States Court of Appeals

For the Second Circuit.

LILIAM JUNCO and GUILLERMO SUAREZ-SOLIS,
as Co-Guardians of MIGUEL ANGEL JUNCO, Jr., an In-
fant under the age of 14 years, and LILIAM JUNCO,
as Administratrix and Personal Representative of the
Estates of MIGUEL A. JUNCO and ALINA S. JUNCO,
Deceased, and MIGUEL ARMANDO JUNCO, HER-
MINIA JUNCO, GUILLERMO SUAREZ-SOLIS and
MARIA PATRICIA ADELAIDE SUAREZ-SOLIS,
Plaintiffs-Appellants,

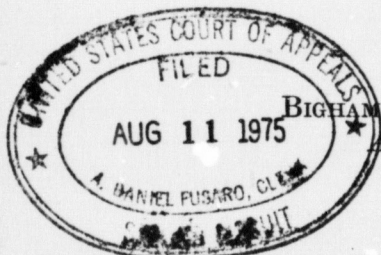
v.

EASTERN AIR LINES, INCORPORATED,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK.

JOINT APPENDIX.

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United States Court of Appeals

FOR THE SECOND CIRCUIT.

LILLIAM JUNCO and GUILLERMO SUAREZ-SOLIS, as Co-Guardians of Miguel Angel Junco, Jr., an Infant under the age of 14 years, and LILLIAM JUNCO, as Administratrix and Personal Representative of the Estates of Miguel A. Junco and Alina S. Junco, Deceased, and MIGUEL ARMANDO JUNCO, HERMINIA JUNCO, GUILLERMO SUAREZ-SOLIS and MARIA PATRICIA ADELAIDE SUAREZ-SOLIS,

Plaintiffs-Appellants,

against

EASTERN AIR LINES, Incorporated,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK.

Relevant Docket Entries.

1973

- Jan. 11 Filed complaint & issued summons.
- Jan. 24 Filed summons with marshal's ret. Served:
Eastern Air Lines, Inc. by Marguerite Tanner on 1/15/73.
Lockheed Aircraft Corp. by Donald Hanes on 1/15/73.
- Jan. 26 Filed Amended complaint.
- Feb. 7 Filed Answer of Deft. Eastern air lines, inc. to complaint.
- Feb. 15 Filed Interrogatories to Plaintiff, as Admx. of the Estate of Alina S. Junco.

Relevant Docket Entries

- Feb. 15 Filed Interrogatories to Plaintiff, as Admx. of the Estate of Miguel A. Junco.
- Feb. 15 Filed Interrogatories to Plaintiff as Guardian Ad Litem of Miguel Angel Junco.
- Feb. 16 Filed Notice of Deposition of plaintiff.
- Mar. 16 Filed Answer of deft. Lockheed Aircraft Corp. to amended complaint.
- Apr. 30 Filed notice of motion; Ret. 5/18/73 at 2 p.m. Room 619; Re: to implead as 3rd. pty.
- Apr. 30 Filed notice of deposition of (1) Frank Borman, (2) Thomas Richert, (3) Capt. Thad J. Royall, (4) J. G. McCully, (5) Capt. James A. Furr, (6) Tim Chiu, (7) Robert Rivenbark, (8) Capt. D. H. Sigler, (9) H. W. Mehrling, (10) William Preissner, (11) James Ryan, (12) Jack Smate, (13) Sergio Alcorta, (14) Henry Harrison, (15) Albert Kast, (16) Laurent Nelson and (17) Dr. Dale Jones.
- May 14 Filed Affdvt. of Anthony J. Ferrara; in response to motion to implead third party.
- May 24 Filed Order Granting Leave to Imp'ead Third Party. Ordered that deft. East. Air Lines, Inc. is granted leave to Implead the U S A. Knapp, J.
- May 29 Filed 3rd. pty comp.
- June 7 Filed 3rd pty summons with marshals ret. served U. S. Atty. S. D. N. Y. by P. Troia 5/31/73.
- July 19 Mailed certified copy of docket entries together with all filed, papers to U. S. District Court, Miami, Florida, pursuant to order, from Multidistrict Litigation to transfer, dated 7-9-73.
- Sept. 10 Filed plttff' affdvt & notice of motion to substitute attys. Ret. 9-18-73
- Sept. 20 Filed plttff's reply affdvt to affdvt submitted by the outgoing attys in opposition.

Relevant Docket Entries

1974

- Apr. 26 Reopened Action pursuant to the Multidistrict Litigation order from, the Southern Dist. of Florida. Received entire file.
- May 6 Filed plttf's affidavit & notice of motion granting a trial & jury, ret. 5-17-74.
- May 6 Filed plttf's memorandum of law in support of motion ret. 5-17-74.
- May 30 Filed deft's Eastern Air Lines memorandum in opposition to motion, for jury trial.
- May 30 Filed affidavit of John MacVrate III, in opposition to motion for a jury trial.
- May 22 Pre-trial Conference held before Magistrate Raby.
- Aug. 2 Filed Memorandum and Order. We note that use of a jury is peculiarly appropriate to task of awarding damages in personal injury & wrongful death cases. Motions are granted and cases will be tried to juries. So ordered. Knapp, J. (mn)
- Sept. 16 Filed deft's Eastern Air Lines request to produce.
- Oct. 25 Pre-trial Conference held by Mag. Raby
- Oct. 29 Pre-trial Conference held by Mag. Raby
- Oct. 30 Pre-trial Conference held by Mag. Raby

1975

- Jan. 14 Filed plttf's answers to interrogs propounded by deft. Eastern Air Lines.
- Jan. 8 Pre-trial Conference held by Magistrate Raby
- Jan. 9 Pre-trial Conference held by Magistrate Raby
- Jan. 10 Pre-trial Conference held by Magistrate Raby
- Jan. 13 Pre-trial Conference held by Magistrate Raby
- Jan. 14 Pre-trial Conference held by Mag. Raby
- Jan. 13 Filed plttf's interrogatories to deft Eastern Air Lines.

Relevant Docket Entries

- Feb. 6 Filed plttf.'s notice of motion re: strike answers to interrogs., etc.
- Feb. 6 Filed Magistrate Raby's report. re: motion to strike, etc.
- Feb. 6 Filed memo-end. on motion docketed this date. this motion having been heard by Mag. Raby and the Court having reviewed the papers submitted in support and having read the Magistrate's report, the motion is granted on consent with respect to verification of deft's answers to interrogs. and granted with respect to plttf.'s request for the names and addresses of the 14 employers. In all other respects the motion is denied. The cross motion for a pre trial physical examination of infant plttf. is granted. Knapp, J. mailed notices.
- Feb. 3 Pre-trial Conference held by Magistrate Raby
- Feb. 4 Pre-trial Conference held by Magistrate Raby
- Feb. 5 Pre-trial Conference held by Mag. Raby
- Feb. 17 Pre-trial Conference held by Mag. Raby
- Feb. 20 Pre-trial Conference held by Mag. Raby
- Feb. 21 Pre-trial Conference held by Mag. Raby
- Feb. 22 Pre-trial Conference held by Mag. Raby
- Feb. 23 Pre-trial Conference held by Mag. Raby
- Feb. 24 Pre-trial Conference held by Mag. Raby
- Feb. 27 Pre-trial Conference held by Mag. Raby
- Feb. 14 Filed affdvt of Ann Abbott served plttfs memorandum of law on conflict of laws on the issue of death damages recoverable upon Bingham Englar Jones & Houston attys for deft. Eastern Air Lines on 2-12-75 & Plttfs memorandum of law
- Feb. 18 Filed plttfs' reply affdvt. re: report of Magistrate Raby.

Relevant Docket Entries

- Feb. 14 Filed Opinion #41889—On the recommendation of Magistrate Knapp, to whom this case was assigned for all pre-trial purposes, the Court directs that the infant plttf.—Miguel Junco, Jr.—submit to an electroencephalogram and skull X-ray examination on 2-18-75, etc. Knapp, J. mn
- Feb. 20 Before Levet, J. Pre-trial conference held & concluded. Case returned to Judge Knapp.
- Mar. 4 Filed consent & pre-trial order. So ordered. Knapp, J. Ret. to Knapp, J.
- Mar. 5 Filed deft. Eastern Air Lines additional answer to interrogs.
- Feb. 11 Pre-trial Conference held by Mag. Raby
- Feb. 13 Pre-trial Conference held by Mag. Raby
- Feb. 14 Pre-trial Conference held by Mag. Raby
- Feb. 18 Pre-trial Conference held by Magistrate Raby
- Feb. 11 Pre-trial Conference held by Mag. Raby
- Feb. 13 Pre-trial Conference held by Mag. Raby
- Feb. 14 Pre-trial Conference held by Mag. Raby
- Feb. 18 Pre-trial Conference held by Magistrate Raby
- Mar. 21 Filed plttf's affidavit & notice of motion setting case down for immediate trial ret. on 4-4-75.
- Mar. 21 Filed plttf's affidavit & notice of motion setting case down for immediate trial ret. before Edelstein, Ch. J. on 4-4-75.
- Apr. 4 Filed affidavit of J. J. Martin in response to plttf's application for immediate trial.
- Apr. 8 Filed Memo-endorsed on plttf's motion filed 3-21-75 for immediate trial. Motion denied for reasons stated in open court. So ordered. Knapp, J.
- Apr. 8 Filed Memo-endorsed on plttf's 2nd motion filed 3-21-75 for immediate trial. Motion denied for the reasons stated in open court. So ordered. Knapp, J. m/n

Relevant Docket Entries

- Apr. 15 Filed plttfs.' notice of motion re: reconsideration of the denial of the appl. for a certification pur. Rule 1292(b) FRCP ret. 5-2-75.
- Mar. 24 Pre-trial Conference held by Mag. Raby
- Mar. 25 Pre-trial Conference held by Mag. Raby
- Mar. 26 Pre-trial Conference held by Mag. Raby
- Mar. 27 Pre-trial Conference held by Mag. Raby
- Mar. 31 Pre-trial Conference held by Mag. Raby
- Apr. 28 Filed transcript of record of proceedings dated 2/20/75
- May 8 Filed Memorandum & Order #42380: In the course of a preliminary hearing before me, the def't. orally moved to dismiss such portions of the complaint as purport to state a cause of action on behalf of the New York grand-parents & as can be construed as claiming damages on behalf of the infant for mental anguish & grief. Under New York law the New York, grandparents have no standing to sue. Deft's motion is granted. I therefore certify pursuant to 28 U. S. C. 1292(b) that a controlling question of law is involved as to which there is substantial ground for difference of opinion & that, in my judgment an immediate appeal from this order would materially advance the ultimate termination of the litigation. So ordered. Knapp, J. m/n
- May 28 Filed transcript of record of proceedings, dated 3/3/75
- June 5 Filed notice that the record on appeal has certified and transmitted to the U. S. C. A.
- June 5 Filed Undertaking for Costs on Appeal by Home Indemnity Co. in the sum of \$250.

Amended Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

LILLIAM JUNCO, as Guardian Ad Litem of Miguel Angel Junco, an Infant Under the Age of 14 Years, and as Administratrix and Personal Representative of the Estates of Miguel A. Junco and Alina S. Junco, Deceased,

Plaintiff,

against

EASTERN AIR LINES, Inc. and LOCKHEED AIRCRAFT CORPORATION,

Defendants.

73 Civ. 196 (WK)

Plaintiff, for her complaint, by her attorneys, Orans, Elsen & Polstein, upon information and belief, alleges as follows:

1. At all times herein mentioned the infant plaintiff was a citizen and resident of the State of New York, the adult plaintiff was a citizen of Cuba and resident of the State of New York, and both resided in Queens County at the time of the occurrence alleged herein. Defendant Eastern Air Lines, Inc. ("Eastern") was and is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business outside the State of New York, and maintains an office in New York County for conducting its business. Defendant Lockheed Aircraft Corporation ("Lockheed") was and is a California Corporation with its principal place of business outside the State of New York, and

Amended Complaint

maintains an office in New York County for conducting its business. The amount in controversy herein is in excess of Ten Thousand (\$10,000.00) Dollars exclusive of interest and costs.

2. Plaintiff Miguel Angel Junco is a one-year-old infant.

3. On January 15, 1973, Letters of Guardianship of the person and property of infant plaintiff Miguel Angel Junco were duly granted and issued to Lilliam Junco by order of the Hon. Louis D. Laurino, Surrogate of Queens County.

4. At all times hereinafter mentioned defendant Eastern was and is a common carrier of passengers by airplane and was and is engaged as such carrier in the States of New York and Florida and elsewhere.

5. At all times hereinafter mentioned defendant Lockheed was engaged in the business of designing, manufacturing and selling airplanes, and said defendant designed and manufactured a certain aircraft commonly known as the "Lockheed TriStar L-1011".

6. Prior to the occurrence complained of herein defendant Lockheed sold one of the aforesaid aircraft known as a "Lockheed TriStar L-1011" to defendant Eastern for use in the latter's business as a common carrier of passengers for hire.

7. On or about December 29, 1972, defendant Eastern owned, operated and controlled the aforesaid Lockheed TriStar L-1011 aircraft on a flight designated "Flight 401" from New York City to Miami, Florida, which crashed in the vicinity of Miami International Airport, Miami, Florida.

8. At the time of such crash said aircraft was under the exclusive control of defendant Eastern, its agents, servants and employees.

Amended Complaint

9. At all times prior to the occurrence complained of herein infant plaintiff resided with his parents, Miguel Angel Junco and Alina S. Junco, paternal grandparents, Miguel Armando Junco and Herminia G. Junco, and aunt, Lilliam Junco.

10. Infant plaintiff and his parents were passengers for hire on said Flight 401.

11. As a result of said crash Miguel Angel Junco and Alina S. Junco received grievous injuries which resulted in their deaths, and infant plaintiff Miguel Angel Junco received serious and possibly permanent personal injuries.

12. On January 18, 1973, Letters of Administration of the goods, chattels, and credits of Miguel A. Junco (a/k/a Miguel Angel Junco), deceased, were granted to Lilliam Junco by order of Hon. Louis D. Laurino, Surrogate of Queens County.

13. On January 25, 1973, Letters of Administration of the goods, chattels and credits of Alina Junco (a/k/a Alina Suarez Solis Junco), deceased, were granted to Lilliam Junco by order of Hon. Louis D. Laurino, Surrogate of Queens County.

FOR A FIRST CLAIM

(Personal Injuries to Infant Plaintiff)

14. Plaintiff Lilliam Junco, as guardian ad litem of the infant plaintiff, repeats and realleges all of the allegations contained in paragraphs "1" through "13" with the same force and effect as if set forth fully herein.

15. The aforesaid crash was caused by the negligence of either or both defendants, their agents, servants and employees, in the design, fabrication, manufacture, sale, operation, maintenance and control of the aforesaid aircraft, the failure to exercise the highest degree of care

Amended Complaint

consistent with the practical operation of the plane and the failure to exercise that degree of due diligence and reasonable care commensurate with the duty owed to passengers.

16. The infant plaintiff in no way was negligent or contributed to the happening of the aforesaid occurrence.

17. By reason of the foregoing, infant plaintiff sustained serious, protracted and possibly permanent injuries, and has been damaged thereby in the sum of \$1,000,000.

FOR A SECOND CLAIM

(Personal Injuries to Infant Plaintiff)

18. Plaintiff Lilliam Junco, as guardian ad litem of the infant plaintiff, repeats and realleges all of the allegations contained in paragraphs "1" through "13" with the same force and effect as if set forth fully herein.

19. Defendants, either or both, expressly and impliedly warranted to the public, including the deceased parents of infant plaintiff, that said aircraft, its engines, landing gear, electrical hydraulic and control systems, ground avoidance gear, flap mechanisms, flight control systems, automatic pilot, altimeters and other parts were of merchantable quality, safe and fit for the purposes for which they were designed, manufactured, assembled, sold, intended and used, and infant plaintiff's deceased parents relied upon such warranties.

20. Defendants breached their aforesaid warranties in that said aircraft and its aforesaid component parts were not of merchantable quality, safe, nor fit for the purposes for which they were designed, manufactured, assembled, sold, intended and used.

Amended Complaint

21. By reason of the foregoing, infant plaintiff sustained serious, protracted and possibly permanent injuries and has been damaged thereby in the sum of \$1,000,000.

FOR A THIRD CLAIM

(Wrongful Death on Behalf of Miguel Angel Junco)

22. Plaintiff Lilliam Junco repeats and realleges all of the allegations contained in paragraphs "1" through "13" and "15" with the same force and effect as if set forth fully herein.

23. At all times prior to the occurrence complained of herein Miguel Angel Junco and Alina S. Junco, deceased, were gainfully employed and fully supported their infant son and the paternal grandparents, Miguel Armando Junco and Herminia G. Junco, with whom they resided.

24. As a result of the foregoing, and the death of his father, Miguel Angelo Junco, infant plaintiff has been deprived of the support and services of said parent and will continue to suffer such loss in the future, has lost parental companionship, instruction, advice, love and protection, has suffered mental pain, suffering and anguish, and such losses will continue in the future.

25. As a result of the foregoing, and the death of their son, Miguel Armando Junco and Herminia G. Junco have been deprived of his company and consortium, support and maintenance, have sustained other pecuniary losses, and will continue to suffer such losses in the future.

26. As a result of the foregoing, and the death of Miguel A. Junco, his representative and survivors have been injured thereby in the sum of \$10,000,000.

Amended Complaint

FOR A FOURTH CLAIM

(Wrongful Death on Behalf of Miguel Angel Junco)

27. Plaintiff Lillian Junco repeats and realleges all of the allegations contained in paragraphs "1" through "13", "19", "20" and "23" through "25" with the same force and effect as if set forth fully herein.

28. As a result of the foregoing, and the death of Miguel A. Junco, his representative and survivors have been injured thereby in the sum of \$10,000,000.

FOR A FIFTH CLAIM

(Wrongful Death on Behalf of Alina S. Junco)

29. Plaintiff Lillian Junco repeats and realleges all of the allegations contained in paragraphs "1" through "13", "15" and "23" with the same force and effect as if set forth fully herein.

30. As a result of the foregoing, and the death of his mother, Alina S. Junco, infant plaintiff has been deprived of the support and services of said parent and will continue to suffer such loss in the future, has lost parental companionship, instruction, advice, love and protection, has suffered mental pain, suffering and anguish, and such losses will continue in the future.

31. As a result of the foregoing, and the death of their daughter-in-law, Miguel Armando Junco and Herminia G. Junco have been deprived of her company and consortium, support and maintenance, have sustained other pecuniary damages and will continue to suffer such losses in the future.

Amended Complaint

32. As a result of the foregoing, and the death of Alina S. Junco, her representative and survivors have been injured thereby in the sum of \$10,000,000.

FOR A SIXTH CLAIM

(Wrongful Death on Behalf of Alina S. Junco)

33. Plaintiff Lilliam Junco repeats and realleges all of the allegations contained in paragraphs "1" through "13", "19", "20", "23", "30" and "31" with the same force and effect as if set forth fully herein.

34. As a result of the foregoing, and the death of Alina S. Junco, her representative and survivors have been injured thereby in the sum of \$10,000,000.

FOR A SEVENTH CLAIM

(Personal Injuries to Miguel Angel Junco)

35. Plaintiff Lilliam Junco repeats and reiterates all of the allegations contained in paragraphs "1" through "13" and "15" with the same force and effect as if set forth fully herein.

36. As a result of the foregoing Miguel Angel Junco, deceased, sustained personal injuries resulting in pain, suffering and death, and was damaged thereby in the amount of \$500,000.

FOR AN EIGHTH CLAIM

(Personal Injuries to Miguel Angel Junco)

37. Plaintiff Lilliam Junco repeats and reiterates all of the allegations contained in paragraphs "1" through

Amended Complaint

"13" "19" and "20" with the same force and effect as if set forth fully herein.

38. As a result of the foregoing Miguel Angel Junco, deceased, sustained personal injuries resulting in pain, suffering and death, and was damaged thereby in the amount of \$500,000.

FOR A NINTH CLAIM

(Personal Injuries to Alina S. Junco)

39. Plaintiff Lilliam Junco repeats and reiterates all of the allegations contained in paragraphs "1" through "13" and "15" with the same force and effect as if set forth fully herein.

40. As a result of the foregoing Alina S. Junco, deceased, sustained personal injuries resulting in pain, suffering and death, and was damaged thereby in the amount of \$500,000.

FOR A TENTH CLAIM

(Personal Injuries to Alina S. Junco)

41. Plaintiff Lilliam Junco repeats and reiterates all of the allegations contained in paragraphs "1" through "13", "19" and "20" with the same force and effect as if set forth fully herein.

42. As a result of the foregoing Alina S. Junco, deceased, sustained personal injuries resulting in pain, suffering and death, and was damaged thereby in the amount of \$500,000.

WHEREFORE, Lilliam Junco, as guardian ad litem of Miguel Angel Junco, an infant under the age of 14 years, and as Administratrix and personal representative of

Amended Complaint

the Estates of Miguel A. Junco and Alina Junco, deceased, demands judgment against defendants, either or both, on the First Claim in the sum of \$1,000,000, upon the Second Claim in the sum of \$1,000,000, upon the Third Claim in the sum of \$10,000,000, upon the Fourth Claim in the sum of \$10,000,000, upon the Fifth Claim in the sum of \$10,000,000, upon the Sixth Claim in the sum of \$10,000,000, upon the Seventh Claim in the sum of \$500,000, upon the Eighth Claim in the sum of \$500,000, upon the Ninth Claim in the sum of \$500,000 and upon the Tenth Claim in the sum of \$500,000; all with appropriate costs, interest and disbursements of this action.

ORANS, ELSEN & POLSTEIN

Attorneys for Plaintiff

By: ROBERT POLSTEIN

A Member of the Firm

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Pre-Trial Order.

[SAME TITLE.]

On February , 1975, the parties in this action or their attorneys appeared before the Court at a pre-trial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure, and the following action was taken:

I. The pleadings were agreed to be deemed amended in accordance with the framing of the issues in this action in Paragraph IX of this Pre-Trial Order.

II. The parties agreed that the trial of this action should be based upon this Order and upon the pleadings as amended in accordance herewith. The parties further agreed that no issues are abandoned, however, liability is no longer an issue. Eastern Air Lines has admitted liability for such damages as are allowed under the applicable law arising out of the crash of Eastern Air Lines Flight 401 on December 29, 1972 at 11:42 P.M., approximately 18 miles from Miami International Airport. Accordingly, an order may be entered discontinuing the action against the Lockheed Aircraft Corporation and dismissing the third-party complaint against the United States Government without costs, with the distinct agreement that Eastern is fully responsible for all damages in this law suit. In the event that the final determination of this law suit by way of judgment or settlement is unpaid or unsatisfied, then any stipulation of discontinuance entered into herewith is null and void.

III. (a) The parties stipulated that the following facts are not in dispute in this action (each party reserving the right to object to the materiality of any such stipulated fact and its relevancy to the issues):

1. Miguel Angel Junco was born on August 28, 1942 and was 30 years old at the time of his death.

2. Alina S. Junco was born on May 2, 1944 and was 28 years old at the time of her death.

Pre-Trial Order

3. Miguel Armando Junco was born on October 2, 1906 and was 66 years old at the time of the accident, and is the father of Miguel Angel Junco and the paternal grandfather of Miguel Angel Junco, Jr.

4. Herminia Junco was born on December 24, 1913 and was 59 years old at the time of the accident, and is the mother of Miguel Angel Junco and the maternal grandmother of Miguel Angel Junco, Jr.

5. Guillermo Suarez-Solis was born on February 24, 1909 and was 63 years old at the time of the accident, and is the father of Alina S. Junco and the maternal grandfather of Miguel Angel Junco, Jr.

6. Maria Patricia Adelaide Suarez-Solis was born on November 27, 1910 and was 62 years old at the time of the accident, and is the mother of Alina S. Junco and the maternal grandmother of Miguel Angel Junco, Jr.

7. Liliam Junco was born on January 29, 1940 and was 32 years of age at the time of the accident, and is the sister of Miguel Angel Junco and the aunt of Miguel Angel Junco, Jr.

8. Eastern Air Lines, Inc. is a Delaware corporation, having its principal place of business in the State of Florida.

9. Miguel Angel Junco, Alina S. Junco and Miguel Angel Junco, Jr., were passengers lawfully aboard Eastern Air Lines Flight 401 en route from New York to Miami on December 29, 1972, which crashed at 11:42 P.M., approximately 18 miles from Miami International Airport.

10. Miguel Angel Junco was killed on December 29, 1972 while a lawful passenger aboard Eastern Air Lines Flight 401 which crashed at 11:42 P.M., approximately 18 miles from Miami International Airport.

Pre-Trial Order

11. Alina S. Junco was killed on December 29, 1972 while a lawful passenger aboard Eastern Air Lines Flight 401 which crashed at 11:42 P.M., approximately 18 miles from Miami International Airport.

12. The infant Miguel Angel Junco, Jr. sustained injuries on December 29, 1972, as a result of the crash of defendant Eastern Air Lines' airplane in which the infant was a passenger, approximately 18 miles from Miami International Airport at 11:42 P.M. on that date.

13. The life expectancy tables (Vital Statistics of the United States, 1971, Vol. II, Section 5, United States Department of Health, Education and Welfare) provided the following:

(i) Miguel Angel Junco, a white male of age 30, had an average remaining lifetime of 41.1 years.

(ii) Alina S. Junco, a white female of age 28, had an average remaining lifetime of 49.6 years.

(iii) Miguel Angel Junco, Jr., a white male of age 11 months, has an average remaining lifetime of 69.6 years.

(iv) Miguel Armando Junco, a white male of age 66 years, has an average remaining lifetime of 12.6 years.

(v) Herminia Junco, a white female of age 59 years, has an average remaining lifetime of 21.6 years.

(vi) Guillermo Suarez-Solis, a white male of age 63 years, has an average remaining lifetime of 14.4 years.

(vii) Maria Patricia Adelaide Suarez-Solis, a white female of age 62 years, has an average remaining lifetime of 19.2 years.

Pre-Trial Order

14. That by order, dated August 20, 1974, of the Surrogate of Queens County, New York, Liliam Junco and Guillermo Suarez-Solis were made co-guardians of the person and property of Miguel Angel Junco, Jr.

15. The Court has jurisdiction of all parties and persons mentioned above and of the subject matter.

16. The facts of liability are not in dispute as Eastern Air Lines, Inc. has conceded liability as set forth in Paragraph II above.

III. (b) The plaintiffs' contentions as to damages are as follows:

1. Plaintiffs contend that the law of Florida prevails on the issue of damages. The quantum of damages under Florida law includes the following:

"Sec. 768.18 *Definitions* As used in Sections 768.18-768.27:

"(1) 'Survivors' means the decedent's spouse, minor children, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters.

"(2) 'Minor children' means unmarried children under twenty-one (21) years of age.

"(3) 'Support' includes contribution in kind as well as money.

"(4) 'Services' means tasks, usually of a household nature, regularly performed by the decedent that will be a necessary expense to the survivors of the decedent. These services may vary according to the identity of the decedent and survivor and shall be determined under the particular facts of each case.

Pre-Trial Order

"(5) 'Net accumulations' means the part of the decedent's expected net business or salary income, including pension benefits, that the decedent probably would have retained as savings and left as part of his estate if he had lived his normal life expectancy. 'Net business or salary income' is the part of the decedent's probable gross income after taxes, excluding income from investments continuing beyond death, that remains after deducting the decedent's personal expenses and support of survivors, excluding contributions in kind."

* * *

"Sec. 768.21 *Damages*

"All potential beneficiaries of a recovery for wrongful death, including the decedent's estate, shall be identified in the complaint, and their relationships to the decedent shall be alleged. Damages may be awarded as follows:

"(1) Each survivor may recover the value of lost support and services from the date of the decedent's injury to his death, with interest, and future loss of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority in the case of healthy minor children, may be considered.

* * *

Pre-Trial Order

"(3) Minor children of the decedent may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury.

* * *

"(6) The decedent's personal representative may recover for the decedent's estate the following:

"(a) Loss of earnings of the deceased from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest. If the decedent's survivors include a surviving spouse or lineal descendants, loss of net accumulations beyond death and reduced to present value may also be recovered.

(b) Medical or funeral expenses due to the decedent's injury or death that have become a charge against his estate or that were paid by or on behalf of decedent, excluding amounts recoverable under subsection (5)."

2. Liliam Junco, being the Administratrix of the Estates of Miguel A. Junco and Alina S. Junco, is suing on behalf of all those individuals who are entitled to recover under the Florida Wrongful Death Law, and therefore both the paternal grandparents as well as the maternal grandparents are entitled to share in the recovery.

3. Plaintiffs are entitled to recover for the pain and suffering endured by Miguel Angel Junco and Alina S. Junco prior to their deaths. Counsel for plaintiffs concedes that he has no eyewitness testimony as to whether decedents actually endured any conscious pain and suffering at the time of the accident.

4. The infant, Miguel Angel Junco, Jr., is entitled to damages for his own personal injuries and for all of the

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items of damage allowed under the Florida Death Statute for the death of his parents, Miguel A. Junco and Alina S. Junco.

5. The maternal grandparents, Guillermo Suarez-Solis and Maria Patricia Adelaide Suarez-Solis, and the paternal grandparents, Miguel Armando Junco and Herminia Junco, are entitled to the full measure of damages allowed under the law of Florida for the death of their respective children, Alina S. Junco and Miguel A. Junco.

6. Among other things, the survivors are entitled to loss of present and future support and services; recovery for loss of nurture, care, guidance, instruction, companionship, succor, attention, and mental pain and suffering and grief; net accumulations to estate destroyed by reason of death; support in kind; and any and all other loss allowable to a minor child and to parents who survive.

7. In addition, the survivors are entitled to damages allowable for the conscious pain and suffering of Miguel A. Junco and Alina S. Junco, deceased.

8. The plaintiffs are entitled to recover damages for the nature and extent of the personal injuries, mental and physical, sustained by the infant, Miguel Angel Junco, Jr., who was a passenger on the plane, together with all elements of damage, including pain and suffering, future medical expenses, future disability, future inability to function as a normal person, future, impact upon earning capacity of the infant, and all other items of general damages attendant on the infant's personal injuries.

9. The plaintiffs are entitled to recover damages for the mental condition of the child, Miguel Angelo Junco, Jr., and his inability and disability to function and perform and develop as a child of his age should; the neces-

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sity for psychiatric care now and in the future for the infant, Miguel Angel Junco, Jr.; loss of nurture, care, guidance, succor, attention, religious and moral upbringing to the infant, Miguel Angel Junco, Jr.

10. All claims and contentions which form a part of all pleadings in this law suit are reiterated and reaffirmed at this point in order to apprise the Court that plaintiffs do not intend to waive nor abandon any of said claims although not set forth in detail at this juncture.

III. (c) The defendant's contentions are as follows:

1. That the law of the State of New York is applicable.
2. That the parents of Alina S. Junco have not sustained any loss under either New York or Florida law.
3. That in accordance with the law of the State of New York, the infant plaintiff, Miguel Angel Junco, Jr., is not entitled to recover for his mental pain and suffering arising as a result of the death of his parents.
4. That if the law of Florida is held applicable, then it is the defendant's contention that the plaintiffs are barred from claiming conscious pain and suffering on behalf of the decedents by reason of the provisions of Section 768.21 of the Florida statutes.

IV. (a) Annexed hereto and made a part hereof, under a separate listing, are the Exhibits which the plaintiffs presently have in their possession. Plaintiffs are unable to state with certainty which of these Exhibits will actually be used upon the trial of the action, depending upon decision which will be made as the trial progresses. Nor are the plaintiffs in a position to attest to the authenticity or the relevance of these Exhibits except as indicated in the annexed list.

1. Plaintiffs' Exhibits—See annexed list marked Appendix 1.

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2. Defendant's Exhibits—See annexed list marked Appendix 2.

3. There are no third party exhibits.

4. In the event that either party obtains any exhibit or exhibits which are not listed herein, prompt notice shall be given in writing, setting forth the reason why said exhibit or exhibits were not previously identified.

IV. (b) Plaintiffs propose to introduce into evidence the following hospital records:

1. Palmetto General Hospital, Palmetto Expressway and N.Y. 122 Street, Hialeah, Florida 33016, for the admission of Miguel Angel Junco, Jr. from December 29, 1972 to January 1, 1973.

2. Variety Children's Hospital, 61 25 S. W. 31st Street, Miami, Florida, 33155, for the admission of Miguel Angel Junco, Jr. from January 1, 1973 to January 4, 1973.

3. New York Medical College, Flower & Fifth Avenue Hospital record of Alina S. Junco, admission of January 10, 1972 to January 15, 1972 and Miguel Angel Junco, Jr., admission of January 11, 1972 to January 15, 1972.

These above-listed hospital records are authenticated by a certification of the Custodian of the Records which certifies that the copies are true and complete. More formal proof of the authenticity of the records is waived.

IV. (c) All of the Exhibits listed in Paragraph IV (a) above are deemed marked for identification only, except for Exhibits designated by one asterisk which are concerned to be genuine without conceding admissibility, and Exhibits designated by two asterisks, whose admissibility is conceded.

V. Annexed hereto and made a part hereof as Appendices 3 and 4, respectively, are listings of plaintiffs' witnesses and defendant's witnesses. Those witnesses

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from whom expert testimony will be elicited have their specialty and/or field of expertise listed.

Should either party hereafter decide to call any additional witnesses, prompt notice of their identity shall be given in writing, setting forth the reason why such witness was not theretofore identified. No witness may be called at trial unless identified as herein stated.

VI. Inapplicable.

VII. The following are all of the claims for damages asserted by the plaintiffs in this action as of the date of this conference. There are no counterclaims.

With respect to the infant, Miguel Angel Junco, Jr., who was a passenger on the plane and did sustain and suffer permanent, protracted, serious personal injuries:

For pain and suffering;

For future medical expenses;

For future disablement;

For future inability to function as a normal person;

For future impact upon earnings and earning capacity; and

For all other items of general damages attendant to the personal injuries suffered by the infant plaintiff,

The sum claimed for damages for personal injuries on behalf of the infant, Miguel Angel Junco Jr. is Two Million Dollars (\$2,000,000.00).

With respect to the wrongful death action for the death of both of his parents on behalf of the infant, Miguel Angel Junco, Jr.:

For loss of support of both his mother and father;

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For loss of services of both his mother and father;

For loss of nurture, care, guidance, instruction, companionship, succor and attention, now and in the future, of both his mother and father;

For mental pain and suffering and grief;

For accumulations to estate destroyed by reason of the death of both of his parents;

For loss of support in kind; and

For any and all other losses allowable to a minor child whose parents' lives were wrongfully taken,

The sum claimed for damages on behalf of the infant, Miguel Angel Junco, Jr. for the wrongful death of his parents is Ten Million (\$10,000,000.00) Dollars.

With respect to Miguel Armando Junco and Herminia Junco, for the death of their son, Miguel A. Junco:

For loss of present and future support;

For loss of present and future services;

For loss of actual pecuniary support;

For loss of services and support in kind, including loss of nurture, care, guidance, instruction, companionship, succor and attention, now and in the future; and

For any and all other losses allowable under the Florida wrongful death statute,

The sum claimed for damages on behalf of Miguel Armando Junco and Herminia Junco is Ten Million Dollars (\$10,000,000.00).

With respect to Guillermo Suarez-Solis and Maria Patricia Adelaide Suarez-Solis for the death of their daughter, Alina S. Junco:

It is claimed that the maternal parents received support and services in kind.

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For the loss of services and support in kind, including loss of nurture, care, guidance, instruction, companionship, succor and attention, now and in the future; and

For any and all other losses allowable under the Florida wrongful death statute,

The sum claimed for damages on behalf of Guillermo Suarez-Solis and Maria Patricia Adelaide Suarez-Solis is Ten Million Dollars (\$10,000,000.00).

With respect to the conscious pain and suffering and personal injuries to Migual A. Junco, deceased, which occurred between the time of the accident and the time of death:

The sum claimed for damages is Five Hundred Thousand Dollars (\$500,000.00).

With respect to the conscious pain and suffering and personal injuries to Alina S. Junco, deceased, which occurred between the time of the accident and the time of death:

The sum claimed for damages is Five Hundred Thousand Dollars (\$500,000.00).

VIII. The parties also agreed on the following matters:

(a) The plaintiffs, out of an abundance of caution, estimate that approximately 15 trial days will be required in order to complete plaintiffs' direct case. The plaintiffs will attempt to reduce this time. However, it is impossible at the present time to estimate a shorter time and still protect the plaintiffs' right to have a full day in Court.

The maximum number of trial days required by the defendant is three (3) days.

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(b) (1) The parties agree that the caption of this action be amended to read as follows:

LILIAM JUNCO and GUILLERMO SUAREZ-SOLIS as Co-Guardians of Miguel Angel Junco, Jr., an infant under the age of 14 years, and LILIAM JUNCO as Administratrix and Personal Representative of the Estates of Miguel A. Junco and Alina S. Junco, Deceased, and MIGUEL ARMANDO JUNCO, HERMINIA JUNCO, GUILLERMO SUAREZ-SOLIS and MARIA PATRICIA ADELAIDE SUAREZ-SOLIS,

Plaintiffs,

against

EASTERN AIR LINES, Inc.,

Defendant.

(b) (2) It is stipulated and agreed by the parties that the complaint be deemed amended to include claims on behalf of the maternal parents herein, Guillermo Suarez-Solis and Maria Patricia Adelaide Suarez-Solis.

(b) (3) It is stipulated and agreed by the parties that plaintiffs' counsel be furnished with a copy of the report or reports of the defendant's medical experts promptly after they examine the infant plaintiff.

(b) (4) It is stipulated and agreed by the parties that a Spanish interpreter be supplied at the plaintiffs' request pursuant to Rule 43(f).

(b) (5) In consideration of the agreement of counsel for plaintiffs that plaintiffs will not seek recovery for any hospital, doctor or funeral expenses paid by Eastern, it is agreed that counsel for Eastern Air Lines, Inc., will not

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in any way convey to the jury these payments by Eastern Air Lines, Inc.

(b) (6) There are no other procedural agreements at the present time other than those which automatically attach to a full and complete trial on the merits.

IX. The issues to be tried are as follows under Florida law:

1. In what amount damages are due to Miguel Angel Junco, Jr., for the wrongful death of his mother, Alina S. Junco.

2. In what amount damages are due to Miguel Junco, Jr. for the wrongful death of his father, Miguel A. Junco.

3. In what amount damages are due to Miguel Armando Junco for the wrongful death of his son, Miguel A. Junco.

4. In what amount damages are due to Herminia Junco for the wrongful death of her son, Miguel A. Junco.

5. In what amount damages are due Guillermo Suarez-Solis for the wrongful death of his daughter, Alina S. Junco.

6. In what amount damages are due to Maria Patricia Adelaide Suarez-Solis for the wrongful death of her daughter, Alina S. Junco.

7. In what amount damages are due to Miguel Angel Junco, Jr., by reason of personal injuries sustained by him.

8. Whether or not and in what amount damages are due to the Estate of the decedent, Miguel A. Junco by reason of the conscious pain and suffering, if any, of the decedent, Miguel A. Junco.

Pre-Trial Order

9. Whether or not and in what amount damages are due to the Estate of the decedent, Alina S. Junco by reason of the conscious pain and suffering, if any, of the decedent, Alina S. Junco.

10. In what amount damages are due for property damages sustained not in excess of \$500.00 tariff limitation per person.

X. The issues to be tried are as follows under New York law.

1. What amount of damages are due plaintiffs by reason of the death of Miguel A. Junco.

2. What amount of damages are due plaintiffs by reason of the death of Alina S. Junco.

3. What amount of damages are due to Miguel Angel Junco, Jr., by reason of personal injuries sustained by him.

4. Whether the decedent Miguel A. Junco experienced any conscious pain and suffering and if so, in what amount damages for such are due his estate.

5. Whether the decedent Alina S. Junco experienced any conscious pain and suffering and if so, in what amount damages for such are due her estate.

6. What amount of damages are due for property damages sustained not in excess of \$500.00 tariff limitation per person.

Dated: New York, New York, February , 1975

So Ordered:

U. S. D. J.

Pre-Trial Order

Consented To:

Attorneys for Plaintiffs

Attorneys for Defendant

Appendix 1 to pre-trial order (Plaintiffs' Exhibits),
Appendix 2 to pre-trial order (Defendant's Exhibits),
Appendix 3 to pre-trial order (Plaintiffs' Witnesses),
and
Appendix 4 to pre-trial order (Defendant's Witnesses)
are omitted.

Memorandum and Order by Knapp, D. J.

KNAPP, D. J.:

This is a diversity wrongful death action growing out of the Eastern Airlines crash in the Florida Everglades which was involved in the case of *Dorothy Gordon, Administratrix v. Eastern Airlines, Inc.*, 73 Civ. 1694. A copy of my opinion in that case is attached hereto and incorporated herein. As in the *Gordon* case the instant plaintiffs were given the option of prosecuting their claims in Florida had they desired to do so.

In the instant case, the decedents are the mother (Alina S. Junco) and father (Miguel A. Junco) of the infant plaintiff Miguel Angel Junco, Jr. They were both New York residents as is the infant. For the sake of clarity, the other plaintiffs, their relationship to the infant plaintiff, the capacity in which they sue and their residences are listed below:

Name	Relationship	Capacity	Residency
Guillermo and Maria Suarez-Solis	maternal grandparents	own right	Florida
Miguel and Herminia Junco.	paternal grandparents	own right	New York
Liliam Junco	aunt	administratrix of decedents' estates	New York
Guillermo Suarez-Solis	maternal grandfather	co-guardian	Florida
Liliam Junco	aunt	co-guardian	New York

The decedents' estates are being administered in the Surrogate's Court of Queens County. The infant's aunt (Liliam Junco) and maternal grandfather (Guillermo Suarez-Solis) were appointed co-guardians by an order of the same Court.

In the course of a preliminary hearing before me, the defendant orally moved to dismiss such portions of the

Memorandum and Order by Knapp, D. J.

complaint as purported to state a cause of action on behalf of the New York grandparents and as can be construed as claiming damages on behalf of the infant for mental anguish and grief. This motion was based on the contention that under New York law the New York grandparents have no standing to sue and grief is not a recognized element of recoverable damages. Under Florida law, on the other hand, the grandparents would have standing to sue and the infant could be compensated for grief and mental anguish.

For the reasons stated in the accompanying *Gordon* opinion, defendant's motion is granted. I therefore rule that New York law applies to all plaintiffs except the maternal grandparents who, as Florida residents, are entitled to plead and prove a cause of action in their own right under Florida law. Since under New York law the paternal grandparents have no cause of action, the complaint is dismissed as to them. Finally, as a result of my determination that New York law applies, the complaint will be—and is—limited to exclude any claim for damages on the part of the infant except for pecuniary loss.

In anticipation of this ruling, plaintiffs have several times urged me to certify the conflict of laws question to the Court of Appeals pursuant to 28 U. S. C. §1292(b). Knowing that Court's reluctance to accept such certification, I have repeatedly indicated my disinclination to do so. However, in view of the calendar situation, this action cannot in any event be tried before September. Plaintiffs persuasively urge upon me the argument that should my ruling be erroneous, a time-consuming and expensive jury trial would have gone for naught. With respect to the New York grandparents' individual action, my ruling is clearly "controlling" in that it obviates any possibility of relief; with respect to the other plaintiffs, it would certainly have a decisive effect upon the amount of the recovery, which after all, is the only issue left for trial (liability having been conceded). Moreover, the question

Memorandum and Order by Knapp, D. J.

of which law controls is one as to which the taking of evidence would seem neither necessary nor helpful.

I therefore certify pursuant to 28 U.S.C. §1292(b) that a controlling question of law is involved as to which there is substantial ground for difference of opinion and that, in my judgment, an immediate appeal from this order would materially advance the ultimate termination of the litigation.

So ordered.

Dated: New York, New York
May 7, 1975.

WHITMAN KNAPP,
U. S. D. J.

KNAPP, D. J.:

This wrongful death action arose out of the tragic crash in the Florida Everglades of an Eastern Airlines jet aircraft while on a landing approach to Miami International Airport on December 29, 1972 which killed 96 of the 161 passengers, including plaintiff's decedent. The action was initially brought in the New York state court and was removed to this court on the basis of diversity jurisdiction, pursuant to 28 U. S. C. §1441. Thereafter, it was transferred—pursuant to 28 U. S. C. §1407—for all pre-trial purposes to the United States District Court for the Southern District of Florida. At the conclusion of discovery proceedings, the action was remanded at plaintiff's request to this Court for trial. Defendant Eastern Airlines, Inc. has admitted liability by formal stipulation, so the only remaining issue to be tried is that of plaintiff's damages.

With respect to the issue of damages, we must decide which state's law applies: that of Florida, where the accident occurred, or that of New York, where the action was

Memorandum and Order by Knapp, D. J.

brought and where plaintiff resides. The dispute between the parties as to this conflict of laws question has arisen because the Florida wrongful death statute¹—unlike its New York counterpart²—provides for damages for grief, mental anguish and loss of companionship, in addition to the traditional award of damages for straight pecuniary loss. So as to resolve the dispute, defendant has made an oral application to strike such part of the *ad damnum* clause as demands compensation for loss of “society, companionship, love and affection”. For the reasons set forth below, the motion is granted.

At the time of the accident, plaintiff's decedent was a New York resident. His estate is now pending in New York and his widow—the plaintiff herein—was and is presently a resident of New York, as are their two children. Plaintiff's decedent purchased his roundtrip ticket in New York and the fatal flight originated in New York. Defendant Eastern Airlines is a Delaware corporation. Although its principal place of business is Miami, Florida, it conducts extensive business and flight operations throughout the Eastern seaboard and beyond. Finally, the accident which gave rise to this litigation occurred in Florida.

Since jurisdiction of this case is based on diversity of citizenship between the parties, this Court is bound by the choice of law rules of New York, the forum state. *Klaxon Co. v. Stentor Electric Manufacturing Co.* (1941), 313 U. S. 487, *Rosenthal v. Warren* (1973), 475 F. 2d 438, 440. Prior to the landmark case of *Babcock v. Jackson* (1963), 12 N. Y. 2d 473, 240 N. Y. S. 2d 743, 191 N. E. 2d 279, New York applied the “simplistic” and “wooden” rule of *lex loci delicti*. *Rosenthal v. Warren, supra*, at 440 and 441. As applied to the facts of this case, this rule would mean that Florida law automatically controlled. New York has, however, abandoned the *lex loci* approach

¹Fla. Stat. §768.21 (1972).

²McKinney's New York E.P.T.L. §5-4.1 *et seq.*

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for a "governmental interests" analysis, looking instead to "the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation". *Babcock v. Jackson*, *supra*, 12 N. Y. 2d at 481, 240 N. Y. S. 2d at 749, 191 N. E. 2d at 283.

The "specific issue" in the case at bar—indeed, the only issue—is plaintiff's measure of recoverable damages. The liability of defendant is not in issue, for it was fully admitted during the pre-trial proceedings in the Southern District of Florida. Therefore, as defendant aptly observes, any matters dealing with its negligence or standard of conduct in the operation of the fatal flight have no relevance to the determination of plaintiff's damages. The distinction between the issue of liability on the one hand and the question of damages on the other hand is crucial, for were liability here at issue, "it is more than likely" that the law of the place of the tort would control. *Babcock*, *supra*, 12 N. Y. 2d at 484, 240 N. Y. S. 2d at 750, 191 N. E. 2d at . The disposition of other issues—such as that of damages—"must turn [however] on the law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented". *Id.* We turn, therefore, to the respective interests of New York and Florida in the measure of damages plaintiff may recover.

Plaintiff advances two "interests" that Florida may have in the application of its law of damages by a New York court in favor of a New York plaintiff: (1) it is the place where the crash occurred and (2) it has a strong interest in promoting travel and tourism within its borders. Neither of these "interests" are applicable in the present posture of this case. The only context in which they could be relevant is where the defendant's standard of conduct is in issue.

More specifically, the New York Court of Appeals, in *Babcock v. Jackson*, *supra*, has carefully distinguished be-

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tween those cases where the defendant's exercise of due care is in issue and those cases where the sole issue is the extent of plaintiff's recovery. In the former situation, the law of the state where the tort occurred controls. *Id.*, 12 N. Y. 2d at 483, 240 N. Y. S. 2d at 750, 191 N. E. 2d at . As the Court there observed

"In such a case, it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place."

In the latter situation however—where the sole issue at bar is the measure of plaintiff's damages—the court must apply the law of the place which has the dominant contacts with the parties and transaction and the superior claim for application of its law. *Id.* That place in the instant case is New York. Plaintiff's decedent was domiciled in New York and his estate is now pending there. His widow—the plaintiff herein—is a New York resident, as are their two children. The ticket for the fatal flight—which originated in New York—was purchased in New York. The only "contacts" with Florida are that the accident occurred there—a "purely adventitious circumstance"³—and defendant's principal place of business is there—an equally insignificant circumstance. *Long v. Pan American World Airways* (1965), 16 N. Y. 2d 343, 266 N. Y. S. 2d 513, N. E. 2d , *Kilberg v. Northeast Airlines* (1961), 9 N. Y. 2d 34, 211 N. Y. S. 2d 133, N. E. 2d . Since the issue of defendant's conduct is not here involved, Florida has no interest in the application of its law to the narrow issue of damages before the court simply because the accident occurred within its borders.

³*Babcock v. Jackson*, *supra*, 12 N. Y. 2d at 482, 240 N. Y. S. 2d at 750, 191 N. E. 2d at .

Memorandum and Order by Knapp, D. J.

Florida's "interest" in promoting travel and tourism within its borders is similarly irrelevant in the context of this case. Presumably, Florida's "interest" in promoting travel is grounded in the assumption that the likelihood of larger than usual recoveries under its liberal damages provision will induce common carriers conducting business within the state to exercise more than ordinary due care. Be that as it may, such a consideration has no bearing in a case, such as ours, where due care—or the lack thereof—is not in issue. Our task is not to determine whether defendant acted negligently, for that much is conceded. Rather, the sole question before us is the measure of plaintiff's damages. The answer to that question is of no concern to Florida, for it could have no interest whatsoever in how much money a New York jury would award a New York resident in a New York court. Its only possible concern would be in what its own residents recover, a situation not now before us.

We turn now to a consideration of New York's interests. A review of that state's decisions on the subject discloses that its public policy is to "protect" its own residents whenever possible "against" the "unfairness"—if any—of "anachronistic" foreign laws and from the denial of recovery under such laws. *Neurzeier v. Kuehner* (1972), 21 N. Y. 2d 121, 125, 335 N. Y. S. 2d 64, 67, *Kilberg v. Northeast Airlines* (1961), 9 N. Y. 2d 39, 211 N. Y. S. 2d 133, 135; *Mackendrick v. Newport News Shipbuilding & D. D. Co.* (Sup. Ct., N. Y. Co. 1969), 302 N. Y. S. 2d 129, 140. It is not New York's policy to *enhance* the recovery of its residents by the application of a more favorable foreign rule. *Rosenthal v. Warren* (2d Cir. 1973), 475 F. 2d 438, 441, n. 4. To do so would contradict those principles of "fair play" and a "just recovery" which New York's governmental interest approach to conflict of

Memorandum and Order by Kistner, D. J.

laws questions seeks to further. *Id.*, at 446. As that state's highest court observed in *Neumeier, supra*, at 126-7,

"While New York may be a proper forum for actions involving its own domiciliaries, regardless of where the accident happened, it does not follow that we should apply New York law simply because some may think it a better rule, where doing so does not advance any New York interest . . ."

Similarly, it does not follow that we, in construing New York law, should apply Florida law "simply because" it is the "better" rule, particularly where doing so does not advance any Florida interest. Nor does New York have an interest in the application of Florida law in the context of this case. As we noted earlier, New York's policy is to *protect* its domiciliaries from unjust foreign laws, not to enhance their recovery by application of a more favorable foreign law simply because that law is better. Indeed, the failure to apply New York law in this case would "impair the smooth working of the multi-state system [and] produce great uncertainty for litigants by sanctioning forum-shopping' . . ., thereby allowing a party to select a forum which could give him a larger recovery than the court of his own domicile". *Neumeier, supra*, at 129. Moreover, the conflict between our decision today and that of the Florida District Court in one of the "Everglades crash" cases that remained in Florida after the multi-district transfer and consolidation, is more apparent than real. In *Dedek v. Eastern Airlines, Inc.* (S. D. Fla. Docket No. 73 Civ. 953), Judge Fay decided that Florida's wrongful death statute—together with its more liberal damage provision—should apply. Since that court's juris-

⁴Plaintiff in the instant case has already had two bites of the apple in this respect: she initially selected New York over Florida as the forum in which to bring her action and subsequently elected to return to New York federal court from its Florida counterpart upon completion of all pre-trial proceedings.

Memorandum and Order by Knapp, D. J.

diction was grounded in diversity of citizenship, Judge Fay was obliged, under *Klaxon Co. v. Stentor Electric Mfg. Co.*, *supra*, to apply the choice of law rules of the forum state. Since Florida is a *lex loci* jurisdiction,⁵ the inescapable conclusion was that Florida's wrongful death statute controlled. In the case at bar, on the other hand, this Court must look to the choice of law rules of New York, which is no longer wedded to the *lex loci* approach, but rather, follows the "governmental interests" approach.

In view of the fact that this conflict of laws issue is the only question which divides the parties, consideration has been given to certification of the question to the Court of Appeals, pursuant to 28 U. S. C. §1292(b). However, the Court has decided not to do so. If the parties wish to settle their dispute without restricting plaintiff's right to appellate review, they may do so by stipulating to settle for X amount of dollars if this decision stands and $\$(x+y)$ should it be reversed.

For the reasons stated above, I concluded that New York's wrongful death statute controls the issue of damages in this case and defendant's oral motion to strike is, accordingly, granted.

So Ordered.

Dated: New York, New York
March 6, 1975.

WHITMAN KNAPP,
U. S. D. J.

⁵*Hopkins v. Lockheed Aircraft Corp.* (Fla. 1967), 201 So. 2d 743.

**Order of the Circuit Court of Appeals Granting Motion
for Leave to Appeal.**

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 30th day of May, one thousand nine hundred and 75.

It is hereby ordered that the motion made herein by counsel for the petitioners dated May 14, 1975 for leave to appeal pursuant to 28 U. S. C. 1292(b) be and it hereby is granted.

PAUL R. HAYS,
USCJ

TOM C. CLARK,
Associate Justice

WALTER R. MANSFIELD,
USCJ



services of three (3) copies of
the within _____ is
hereby admitted this _____ day
of _____, 197

Attorney for

